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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1185

FIRESTONE PLASTICS COMPANY, a Division of THE FIRESTONE TIRE & RUBBER COMPANY, UNION CARBIDE CORPORATION, and THE SOCIETY OF THE PLASTICS INDUSTRY, INC.
Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR, JOHN T. DUNLOP, SECRETARY, U.S. DEPARTMENT OF LABOR, JOHN H. STENDER, ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, and INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
Respondents.

PETITIONERS' REPLY TO OPPOSITION OF RESPONDENTS

May 13, 1975

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The Government's cursory Opposition seeks to minimize the importance of the Federal questions presented by this case and to gloss over the extent to which the decision of the Court below conflicts with numerous other opinions of the Circuits. The Opposition's novel view of the legal issues compels this reply.

1. The applicable scope of review

a. The refusal of the Court below to apply the test mandated by the Act presents a major Federal question on which the Circuits are in conflict.

The Government apparently contends that there is no conflict between the refusal of the Court below to apply the substantial evidence test mandated by the Act and the four opinions cited by Petitioners.[1] This illusion of uniformity results from treating the decisions in a novel and unduly generalized manner. Thus the Government asserts that the conflicting cases stand for nothing more than the proposition that, to the extent the Secretary of Labor "exercises what is more akin to a legislative judgment, that judgment must be reasoned."[2]

This proposition is meaningless. Any decision in the field of administrative law could fit so uncritical a formula. The central point in this proceeding is the Act's express requirement that the Secretary's determinations must not merely be reasoned but must satisfy the far more stringent test of being supported by "substantial evidence in the record considered as a whole." The Court below refused to apply that statutory test. Its decision conflicts with the four opinions cited by Petitioners, in which the Circuits have explicitly held

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[1] The conflicting decisions cited by Petitioners are: *Florida Peach Growers Association, Inc.* v. *United States Department of Labor*, 489 F.2d 120 (5th Cir. 1974); *Dry Color Manufacturers' Association, Inc.* v. *Department of Labor*, 486 F.2d 98 (3rd Cir. 1973); *Associated Industries of New York State* v. *United States Department of Labor*, 487 F.2d 342 (2d Cir. 1973); and *National Roofing Contractors Association* v. *Brennan*, 495 F.2d 1294 (7th Cir. 1974), *cert. denied*, 42 L.Ed.2d 801 (1975).

[2] Opposition, p. 3.

that the substantial evidence test applies to legislative judgments.[3]

The Government argues that a "reasoned" decision by the Secretary is enough. Thus, it apparently acknowledges that the Court below refused to apply the standard of review required by the Act. In an effort to minimize the extent of the conflict, the Government effectively concedes the existence of a major Federal question.

b. The Government does not defend the failure of the Court below to examine any of the record evidence that the Secretary's standard is improper.

The Government does not mention that the record contains a substantial amount of evidence opposed to the Secretary's standard, and that the Court below

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[3] In *Florida Peach Growers Association, Inc.* v. *United States Department of Labor*, 489 F.2d 120 at 128, the Fifth Circuit explicitly held that "although the substantial evidence test is anomalous in the context of informal rulmaking and would not apply were review governed solely by the APA, Congress applied that test as a result of a legislative tradeoff." In *Dry Color Manufacturers' Association, Inc.* v. *Department of Labor*, 486 F. 2d 98 at 104, n. 8, the court noted the general rule that an agency action must be reasoned, but pointed out that the Act goes further in requiring that the action be supported by substantial evidence in the record as a whole. (The Government omits this case from its discussion of the conflicting opinions. Apparently it concedes the conflict.) In *Associated Industries of New York State* v. *United States Department of Labor*, 487 F.2d 342, at 348, Judge Friendly specifically rejected the Government's contention that the substantial evidence test applies only to findings of fact: "there can be no question that the 'determinations' to which § 655(f) applies the substantial evidence test, whatever precisely that may mean in context, include the overall policy decision to promulgate a rule." Finally, in *National Roofing Contractors Association* v. *Brennan*, 495 F.2d 1294 at 1297, the Seventh Circuit specifically noted and applied the statutory test of substantial evidence.

failed to consider any of this evidence. Yet in this respect also the opinion below conflicts with the four opinions cited in note 1 above, as well as with *Synthetic Organic Chemical Manufacturers Ass'n* v. *Brennan*, 503 F.2d 1155 (3rd Cir. 1974), *cert. denied*, March 17, 1975, No. 74-789, and *Industrial Union Department, AFL-CIO*, v. *Hodgson*, 499 F.2d 467 (D.C. Cir. 1974), on which even the Government purports to rely. In all of those cases, and regardless of what test of judicial review they were applying, the courts examined the record evidence opposed to the Secretary's standard. The failure of the Court below to do so is flatly inconsistent.

The Government chooses to characterize the effort of the Court below as "a painstaking examination of the 4,000-page record." Any objective review of that opinion, however, demonstrates the contrary. The Court's review of the evidence was both cursory and one-sided. Out of the 16 appendix pages which comprise the decision below, at most four pages discuss the record evidence (14a-17a). This is not a satisfactory analysis of a 4,000-page record. And none of the Court's discussion relates to the strong evidence that the Secretary's standard is improper.[4]

The applicable standard of review is a critically important question. The Goverment in its Opposition notes (as the industry itself has testified) that vinyl chloride has induced cancer in animals at an exposure

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[4] To cite only one example among many, the Court below seems unaware that a Government consultant who advocated the standard subsequently promulgated by the Secretary nevertheless admitted that the "Record contains no reliable information with regard to the quantity of vinyl chloride that is hazardous to man." J.A. 3727.

level of 50 ppm. But the Government apparently believes that it is unnecessary for the Secretary to support by substantial evidence his decision to reduce permissible exposures for workers to 1 ppm—one fiftieth of what even the Government recognizes is a "very low level of exposure."[5] Like the Court below, the Government fails to consider the strong evidence produced at the hearing that induction of cancer in animals at 50 ppm does *not* mean that the substance is carcinogenic to man at any level above 1 ppm.[6] As the Government's own consultant pointed out, advocates of the Secretary's standard "have attempted to project the dose response curve below the observed values. Such projection is speculative, at best." J.A. 3728. The substantial evidence test was designed to avoid just such speculative and unsupported extrapolations.

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[5] Opposition, p. 2.

[6] Although not in the record of this case, it is significant to note a letter dated March 18, 1974, from Dr. Herbert E. Stokinger, Chief, Toxicology Branch, Division of Laboratories and Criteria Development, National Institute of Occupational Safety and Health, to Dr. Marcus Key, the Director of National Institute of Occupational Safety and Health (the agency that recommended to OSHA the standard that was finally adopted). Writing as Chairman of the Committee on Threshold Limits of the American Conference of Governmental Industrial Hygienists, Dr. Stokinger characterized NIOSH's (and thus OSHA's) decision as "irrational," because NIOSH had "fallen into the fallacious trap of believing that because the substance produces dire consequences at massive concentrations (and in this case probably aided by promoters), such consequences will result from exposure at *all* concentrations. Wrong!" (emphasis and exclamation in original) Petitioners have only recently become aware of the existence of this letter. The letter is set forth in full as Appendix A hereto.

2. Technological infeasibility

a. By defending a technology-forcing approach, the Government concedes the existence of another major Federal question.

The Government apparently contends that the Court below was correct in applying technology-forcing standards. (See Opposition, p. 5, n. 2.) By so doing, it confirms the existence of another substantial Federal question. For the Act—as well as its legislative history and judicial application—make clear that the Secretary cannot institute standards for immediate application if they are not presently feasible. The Act differs in this respect from the statutes involved in the opinions relied on by the Court below.[7]

There is no question, as the Government states (Opposition, p. 5), that the Secretary can require feasible engineering practices to comply with a regulatory standard. But this does not justify requiring engineering methods that are not now feasible.[8]

b. The Government's reliance on respirators to cure the infeasibility of the standard is entirely ill-founded.

Apparently recognizing that the 1 ppm standard is—as the Secretary himself concedes—infeasible, the Government seeks to rely on the respirator provisions of the standard to cure the problem. But this reliance is

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[7] *Chrysler Corporation* v. *Department of Transportation*, 472 F.2d 659, 671-672 (6th Cir. 1972); *Natural Resources Defense Council, Inc.* v. *EPA*, 489 F.2d 390, 411-412 (5th Cir. 1972), *rev'd sub nom., Train* v. *Natural Resources Defense Council, Inc.*, 43 U.S.L.W. 4467 (U.S., April 16, 1975).

[8] Nor does the Act permit a standard to be stated only in terms of "feasibility"; such a standard is impermissibly vague. See pp. 25-27 of the Petition for Certiorari. The Government does not discuss this issue.

misplaced both as a matter of fact and as a construction of the Secretary's standard.

In the first place, respirators are not a viable method of controlling exposures. As OSHA's own witness testified, "At best, any of these devices are an instrument of torture." J.A. 303. Moreover, the use of respirators, even if they were practicable, would not in any way cure the legal flaw resulting from the technological infeasibility of the Secretary's standard. Employers are obligated to initiate the necessary technology in an effort to reduce exposures to 1 ppm; they must provide respirators if they are not immediately successful, but such use does not in any way alleviate the continuing obligation to reach that goal.

The availability of respirators, therefore, even if they were practicable, would not excuse employers from undertaking the expensive and futile task of seeking to do what the Secretary himself admits cannot be done in the foreseeable future. Nor would the existence of satisfactory respirators cure the impermissible vagueness of the Secretary's requirement that, if employers cannot reduce exposures to 1 ppm, they must nonetheless do everything "feasible" to reduce exposures to the "lowest practicable level."

The Government's statement (Opposition, p. 3) that employers can comply with the standard by providing respirators is thus misconceived. Respirators are simply an additional requirement, not a means of satisfying the standard. They cannot be used to relieve employers of the continuing obligation to reduce exposures to 1 ppm. Nor do they provide a defense, either for failing to reach this goal or for failing to do whatever the Secretary may from time to time deem "feasible."

Petitioners respectfully submit that their Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May 13, 1975

APPENDIX A

AMERICAN CONFERENCE OF GOVERNMENT INDUSTRIAL HYGIENISTS

March 18, 1974

Marcus M. Key, Assistant Surgeon General
Director, National Institute for
Occupational Safety and Health
Room 3-32 (Mail Stop 3-30)
5600 Fishers Lane
Rockville, Maryland 20852

Dear Marc:

I was consternated, as were members of my TLV Committee,* when we noted your name associated with the essentially zero tolerance for exposure to VINYL CHLORIDE (Wall Street Journal, March 13, 1974, page 6).

In making this irrational decision, it is clear to us you have fallen into the fallacious trap of believing that because the substance produces dire consequences at massive concentrations (and in this case probably aided by promoters), such consequences will result from exposure at *all* concentrations. Wrong! We have pointed out in many instances that this is not the case in a letter to Stender (attached), and other instances are constantly appearing. (D.C. trip report dated March 15, 1974), showing experimental thresholds for DIOXANE and bis-CME.)

Several unfortunate things ensue from this decision: 1) The Cincinnati staff (and the Rockville staff, if they stop to think) and the TLV Committee are wondering, "What are we doing here?" if we spend months, even years developing criteria documents to assure their validity, only to discover that overnight decisions can be readily made. 2) Such actions can be precedent-setting. 3) What actions,

* Particularly since we weren't consulted, I guess.

we wonder, will be taken against the presently two-dozen-or-so experimentally determined industrial carcinogens? (Attachment Appendix B.)

Gee Whiz, mister!

Sincerely yours,

/s/ HERB

Herbert E. Stokinger, Ph.D.
Chairman
Committee on Threshold Limits

3 Enclosures:

1. Stender letter
2. D.C. Trip report
3. Appendix B